BRILL

Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia
Author(s): Mohammad Hashim Kamali
Source: *Arab Law Quarterly*, Vol. 13, No. 3 (1998), pp. 203-234
Published by: BRILL
Stable URL: http://www.jstor.org/stable/3382008
Accessed: 02-07-2015 19:47 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at http://www.jstor.org/page/info/about/policies/terms.jsp

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

BRILL is collaborating with JSTOR to digitize, preserve and extend access to *Arab Law Quarterly*.

http://www.jstor.org

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

PUNISHMENT IN ISLAMIC LAW: A CRITIQUE OF THE HUDUD BILL OF KELANTAN, MALAYSIA

*Mohammad Hashim Kamali**

INTRODUCTION

Ever since its ratification in November1993 by the State Legislature of Kelantan, the Hudud Bill has been the focus of public debate in Malaysia. The Bill has come under criticism both on specific points as well as generally as being eager to inflict punishment and pain. This approach, although a necessary ingredient of a penal policy, needs to be moderated by such other influences that are felt to be equally important in the formulation of a comprehensive philosophy of punishment. To show care and compassion and to provide an opportunity for those who might be ready to repent and reform are among the considerations that have received greater attention in the formulation of a comprehensive penal policy in modern times. Apart from the essential merit of the harmonious approach, the added emphasis on rehabilitation and reform is an acknowledgement on the part of society at large that crime is not a totally isolated phenomenon and that society has increasingly become an unwilling partner in the rising tide of criminality and aggression.

The Qur'anic outlook on punishment may be characterised by its dual emphasis on retribution and reformation. It is my submission that the conventional *fiqh*i approach to the formulation of the underlying policy toward the *hudud* has failed to be adequately reflective of the Qur'anic guidance on this subject. And then in its typically imitative and *taqlidi* orientation, I further submit, that the Hudud Bill of Kelantan has also failed to be reflective either of the balanced outlook of the Qur'an or of the social conditions and realities of contemporary Malaysian society.

This article is presented in five parts. The first part highlights the provisions of the Bill concerning the six *hudud* offences that will be the focus of our discussion throughout the article. Part two is basically a statement of the problems and it is concerned mainly with the specifics as to where and how could the Hudud Bill be amended and improved. Here I have examined the provisions of the Bill which are in conflict with the Federal Constitution and the Penal Code. Issues are also addressed in this part pertaining to the status of non-Muslims, the proof of *zina*,

* Mohammad Hashim Kamali is Professor of Law at the International Islamic University of Malaysia.

Arab Law Quarterly, [1998] 203–234

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

questions over rape, circumstantial evidence, and issues over apostasy, slanderous accusation, and the punishment of theft.

The next part presents a perspective concerning the understanding of *hudud* in the Qur'an and related developments in *fiqh*. An enquiry into Qur'anic evidence leads us to the conclusion that a certain rigidity which has characterised the juristic formulations of *fiqh* on this theme are neither Qur'anic nor authorised by the Sunnah. "Hudud Allah" in the Qur'an is a broad concept which is neither confined to punishments nor to a legal framework but provides a comprehensive set of guidelines on moral, legal, and religious themes. Juristic thought has, however, followed a different course whereby this broad and comprehensive concept is reduced to mean quantified, mandatory and invariable punishment. The four offences for which the Qur'an prescribed a punishment were on the other hand expanded, in the *fiqh* presentations of the *hudud*, to six, and according to an alternative version, to seven, offences – and this was undertaken in the face of clear evidence that advised a restrictive approach in punitive matters. Whereas the Qur'an has, in all the four instances where specified punishments occur, made provisions for repentance and reformation, juristic doctrine has either left this totally out or reduced it to a mechanical formality that can hardly be said to be reflective of the original teachings of the Qur'an.

Part four enquires into the evidence concerning the punishment of stoning (*rajm*) for *zina* and underlines the issues which have given rise to differences among the *madhahib*. The last part of the article surveys recent views and contributions of Muslim scholars on the implementation of *hudud* in contemporary Muslim societies. The discussion here also advances a perspective over the question as to which should come first: an Islamic government, the *Shari'a*, or the *hudud*. To insist on the *hudud* as an isolated case without providing the necessary context and environment is not likely to engender the desired results and may even prove oppressive and unjust. My discussion in this part ends with a brief analysis of the Hadith, which is also a legal maxim, that *hudud* must be suspended in doubtful situations.

AN OVERVIEW OF THE BILL

The Shari'a Criminal Code (II) Bill 1993 (henceforth referred to as the Bill) consists of 72 clauses and five supplementary schedules, divided into six parts, namely *hudud* offences, *qisas* (just retaliation), evidence, implementation of punishments, general provisions and (*Shari'a*) court proceedings. The *hudud* offences in part one also appear under the six headings of theft, highway robbery (*hirabah*), unlawful carnal intercourse (*zina*), *qadhf*, that is slanderous accusation of *zina* which cannot be proved by four reliable witnesses, wine drinking (*shurb*) and apostasy (*irtidad*).

On 25 November 1993 when the state legislature unanimously passed the Bill the Chief Minister of Kelantan made it clear that the Bill "could not be

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

implemented until the Federal Government of Malaysia made changes to the Federal Constitution".[1] This was evidently an acknowledgement on the part of the State Government that by passing the *hudud* Bill, the state legislature had exceeded its jurisdiction under the Federal Constitution. The State Government also announced that the Bill "was prepared by a committee and reviewed and approved by the State Islamic Religious Council and the state Mufti after considering it from all aspects of the Islamic Syariah".[2] The Chief Minister went on record to add that by enacting the Bill, the State Government was "performing a duty required by Islam" and failure to act in this regard "would be a great sin".[3] As to the question whether the people had accepted the State Government's plan to implement the *hudud* laws, the Deputy Chief Minister (Abdul Halim) made the remarkable announcement that "the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate)".[4]

In its section on theft (*sariqa*) the Bill penalises the first offence of theft, when it fulfils all the prescribed conditions (15 such conditions provided under Clause Seven) – with amputation of the right hand from the wrist, and the second offence with amputation of the left foot (in the middle in such a way that the heel may still be usable for walking and standing). The third and subsequent offences of theft are punishable with imprisonment for such terms as in the opinion of the court are "likely to lead to repentance" (Clauses 6 and 52).

The punishment for highway robbery is death and crucifixion if the robbery is accompanied by killing; and it is death only if the victim is killed but no property is taken away. In the event where the robber only takes the property without killing or injuring his victim the punishment is amputation of the right hand and the left foot (Clause 9).

Zina is punishable upon conviction by stoning (with stones of medium size) to death for a married person (i.e., *muḥṣan*) and whipping of 100 lashes plus one year imprisonment for the unmarried. Four eye-witnesses will be required to prove the act of *zina*. Each witness must be an adult male Muslim of just character. Witnesses shall be deemed to be just until the contrary is proven. The Bill also states that pregnancy on the part of an unmarried woman or when she delivers a child shall be evidence of *zina* which would make her liable to the prescribed punishment (Clauses 1, 41 and 46).

Qadhf or slanderous accusation of *zina* which the accuser is unable to prove by four witnesses carries 80 lashes of the whip, and punishment for drinking liquor based on the oral testimony of two persons is whipping of not more than 80 lashes but not less than 40 (Clauses 13 and 22).

A Muslim (adult and sane) who is accused of apostasy is required to repent within three days and failure to do so makes him or her liable to the punishment of

[1] *New Straits Times*, of Kuala Lumpur, 25 November 1993, at p. 8.
[2] *Ibid.*
[3] *Ibid.*
[4] "Hudud Laws for Muslims Only", *New Straits Times*, 19 November 1993.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

death as well as the forfeiture of his or her property. The offender will be free of the death sentence, even if it has been passed, if he or she repents; the property will be returned but the defendant would still be liable to imprisonment "not exceeding five years" (Clause 23).

The Bill provides for the establishment of a Special Shari'a Trial Court consisting of three judges, two of whom shall be ulema, and a Special Shari'a Court of Appeal, consisting of five judges, including three ulema. These courts are to be in addition to the Shari'a courts that normally operate in Kelantan. All sentences can be appealed against and sentences are enforceable, in the case of *hadd* offences, only when confirmed by the Special Appeal Court (Clause 49).

PROBLEMATICS OF THE HUDUD BILL

The Hudud Bill gives rise to three types of problems, one of which is manifested in lack of jurisdiction leading to conflict with the Federal Constitution. Then there are problems relating to the realities of Malaysian society and politics. In the context of a multi-religious society, this Bill raises questions as to whether the nation should be governed by two sets of laws, one for Muslims, the other for non-Muslims! And then the fact that only one of the 13 states of Malaysia has charted a different plan for itself has presented the national government with difficult choices. The other problem here is manifested in the fact that the Bill fails to offer a meaningful alternative as it raises questions over the wisdom of a literalist approach to the understanding of *hudud*. The Bill exhibits no attempt to exercise *ijtihad* over new issues, such that would fulfil the ideals of justice and encourage the development of a judicious social policy.

Constitutional issues

The Federal State power conflict over criminal law assumed new prominence with the passage of this Bill partly because of its overlap with the Penal Code. Some offences under the Bill are also federal law offences, giving rise to the issue of double jeopardy where both laws would be simultaneously enforceable. A person in that situation can seek protection against double jeopardy under Article 7 (2) of the Federal Constitution. There are also a number of offences such as theft, robbery, killing, rape, causing bodily harm, and unnatural offences which have been dealt with by the Penal Code, and there are provisions in this Code which relate to such other offences as false accusation of *zina*, consuming liquor, and using words of contempt against religion.

In an attempt to overcome this problem the Bill has barred any proceedings or trial under the Penal Code of a person who has been tried for the same offence under this Bill (Clause 61). But then questions arise as to the acceptability of this formula and whether it can resolve the conflict which the Bill has given rise to in the first place. It is quite unprecedented for the laws of one jurisdiction to prohibit

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

trial under the laws of another jurisdiction particularly when it is the former that is violating the limits of its jurisdiction under the Constitution.[5]

The Bill also provided for a range of punishments that are far in excess of the limitations which Parliament has imposed on the jurisdiction of Shari'a courts. The Shari'a Courts (Criminal Jurisdiction) Act 1965, as amended in 1984, restricted the jurisdiction of these courts only to Muslims who may be tried for offences punishable with imprisonment of up to three years or a fine of up to RM5,000 or with whipping not exceeding six strokes, or with any combination of these. The *hudud* punishments that the Bill has proposed exceeds these limits, and it is doubtful whether the Special Shari'a Courts that are envisaged in the Bill could lawfully exercise their functions unless the Federal Parliament suitably amends the provisions of the 1965 Act.

As for the possibility that the Bill might be nullified if it were found to be in conflict with the Federal Constitution, The Deputy Chief Minister of Kelantan announced, days before the ratification of the Bill in the State Assembly, that "the Kelantan Government would have fulfilled its responsibilities in tabling and getting the State Legislative Assembly to pass the *hudud* laws. It will then be up to the Federal Muslim leaders to prove their stand on the Islamic Shari'a".[6] He further pointed out that the State Government would not be able to enforce the proposed law unless certain provisions of the Federal Constitution were amended.

The most explicit response to date came from the Prime Minister, Dr Mahathir himself who said on 9 September 1994 that "the Government would not sit back and allow Pas to commit cruel acts against the people in Kelantan, including chopping off the hands of criminals". The Prime Minister added that the Pas version of the Hudud Law "punishes victims while actual criminals were often let off with minimum punishment. For instance, if two people, a Muslim and a non-Muslim, committed a crime, the Muslim offender will be punished severely like having his hands chopped off while the non-Muslim offender will escape with a light sentence like a fine or a month's imprisonment". The Prime Minister said that the Government was convinced that "the law passed by the Kelantan State Assembly in November last year was against the teachings of Islam", adding that the punishment meted out must be fair. However, according to the Pas laws, criminals are let off and the victim is punished. This is "against the true teachings of Islam" and should therefore be rejected.

The Prime Minister said that Pas "was only interested in gaining political mileage" by using the issue in view of the coming general election, adding that Pas leaders were aware of this and would continue to harp on the issue. Dr Mahathir declared that "the Government would take action against the Pas-led Kelantan Government if it implemented the Pas-created Hudud laws". The proposed law could not be enforced because it was not in line with the Federal Constitution. The

[5] *Cf.*, Mohammed Imam, "Islamic Criminal Law in Malaysia: Federal State Jurisdictional Conflict" [1004] *1 Current Law Journal* (March 1994), p. xxix.

[6] "Hudud Laws May Not Be Enforced", *New Straits Times*, 22 November 1993.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

Federal Government cannot allow the Pas Government to enforce the laws which are against the Islamic spirit of justice.[7]

The Shari'a and Hudud Laws Committee of the Malaysian Bar Council announced in early October that the Hudud Bill was consistent with Islamic law, but that there was "inconsistency in certain provisions between *hudud* laws and the Federal Constitution which can be overcome by amending the Constitution". Following this, the State Government of Kelantan renewed its call and urged the Federal Government to review its decision over rejecting the Hudud Bill.[8]

The Law Minister, Syed Hamid Albar, stated in a seminar paper he presented in Kuala Lumpur on 14 October 1994 that the Federal Government may introduce a new law "to check inconsistencies" in the legislation of *Shari'a* law by State Governments. He commented that "*Shari'a* law should not be treated as a state matter" any more because this had given rise to disparities between the state and federal jurisdictions on the one hand and those of the various states on the other. The Federal Government would consult State Governments and *Shari'a* experts, the Minister added, before introducing new legislation, which he referred to as the "Hukum Syarak Act".[9]

To enable the Shari'a Courts to deal with cases of *hudud*, *qisas* and *diyat*, it will be necessary to amend the 9th Schedule, List 2 of the Constitution and repeal the Shari'a Courts (Criminal Jurisdiction) Act. Professor Ahmad Ibrahim who made this observation earlier in 1993 also wrote that another possibility would be for the Federal Government "to enact the *hudud*, *qisas*, *diyat* and *ta'zir* laws for the purpose of uniformity of laws between the states". But the learned author added that it would not be easy to do this "considering the difficulties and problems arising from the Federal Constitution and the present laws in Malaysia".[10]

The Federal Government has obviously not taken up the suggestions made earlier by the Kelantan State Government and the Bar Council Committee. Instead of accommodating requests for constitutional amendment to give the State Government of Kelantan a greater say in *Shari'a* matters, it seems that the Federal Government might well do just the opposite.

The position of non-Muslims

Notwithstanding the attempt in the Hudud Bill (Clause 56) to make the proposed law applicable to Muslims only, and the choice it has granted to non-Muslims to choose if they wish whether the law should apply to them or not, there are questions that have remained unanswered. One of these is concerned, as already indicated, with the issue of jurisdiction. To grant such a choice to non-Muslims tends to fall into conflict with the Federal Constitution which clearly restricts the

[7] *New Straits Times*, Kuala Lumpur, 10 September 1994, pp. 1–2.
[8] *New Straits Times*, 2 October 1994, p. 6.
[9] *New Straits Times*, 15 October 1994, p. 2.
[10] Ahmad M. Ibrahim, "Suitability of the Islamic Punishments in Malaysia," *IIUM Law Journal*, 3, no. 1, January 1993, pp. 14–15.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

state jurisdiction to making law only as to "offences by persons professing the religion of Islam".

Similar questions tend to arise as to the state of the law when both Muslims and non-Muslims are involved in a case of, say adultery or theft. It would seem that the choice of law that is envisaged in Clause 56 would be discriminatory and illogical. The question was rightly posed in a newspaper article when it was asked: If the law is meant for Muslims only, what will happen in cases where the victim is of a different faith from that of the criminal's? Or if the witnesses to the crime are non-Muslims? Or if the accomplices to the crime are followers of different faiths?[11]

The *Shariʿa* itself does not provide for such a choice as in most of the *hudud* crimes difference of religion does not affect the unified application of the law. The only exemption found in the *Shariʿa* is with regard to the consumption of liquor, which by itself is not an offence with respect to a non-Muslim. According to a Hanafi opinion, non-Muslims are also not liable to the *hadd* punishment of *zina*. And then, of course, apostasy cannot be committed by a non-Muslim. But the Bill is anomalous on the application of *hudud*. What if the other party to the offence, whether Muslim or non-Muslim, is a native of another state of Malaysia where the *hudud* punishments are not applied? The Bill clearly provided that it shall apply to every Muslim "in respect of any offence committed by him in the state of Kelantan" (Clause 56). The Kelantan Government had obviously no better alternative as it could only make law for the Muslims of Kelantan, but by the same token, one might say that this provision tends to indulge in a doubtful application of the *hudud*. Imagine a situation where a resident of Kelantan commits an offence of just theft just outside the borders of Kelantan, or chooses to go there for the very purpose of committing adultery, theft, and drinking liquor, etc. The Bill could then be manipulated as it remains open to abuse and there is little that the Government of Kelantan could possibly do to prevent that.

There is a provision in the Bill concerning abetment and conspiracy by two or more persons in which case, "every person who abets or assists or conspires or plots for the commission of such offence shall be guilty of that offence and shall be liable to be punished with imprisonment as *taʿzir* punishment for a term not exceeding ten years" (Clause 57). This clause is evidently designed to cover the eventuality, as discussed above, of a non-Muslim being a party to the *hudud*, for the terms "abetment, assistance, conspiracy and plot" are broad enough to comprise every possible case in which a non-Muslim might be involved in the perpetration of a *hadd* offence.

The non-Muslims of Malaysia have on many occasions expressed apprehension over the manner in which the *Shariʿa* might be interpreted in regards to them. In a Kuala Lumpur seminar held prior to the publication of the Hudud Bill, of which the present writer was a participant, a non-Muslim speaker stated that "Malaysian non-Muslims fear the imposition of the *Shariʿa*", adding that, "if less than enlightened and principled understanding of Islam are used to justify attitudes

[11] Rose Ismail, "Hudud Laws", *New Straits Times*, Kuala Lumpur, 10 July 1994, p. 12.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

toward, or the treatment of, non-Muslims that fall far short of the Qur'anic ideals ... how much worse – we are entitled to wonder – may things become once *Shari'a* law (or rather a certain limited version or understanding of it) is enforced in this country".[12] Non-Muslims have raised questions as to "who will enforce it (*Shari'a*), in what spirit and with what breadth or otherwise of understanding of Islam's founding Qur'anic imperatives?"[13] In voicing their concerns, the non-Muslim community leaders have on the whole spoken positively of the Qur'anic ideals of justice and equality, and "the impressive cultural openness, inclusiveness and cosmopolitanism of Islam", but have warned against restrictive and legalistic approaches towards the implementation of these ideals.[14]

It may be said, in conclusion, that notwithstanding the clear text in Clause 56 which confines the application of the Hudud Bill to the Muslim residents of the State of Kelantan, the next Clause (57) tends to cast doubt on, and overshadow the content of, that Clause. Since every person who abets, or assists or conspires or plots in the perpetration of a *hadd* offence stands guilty of that offence, much would seem to depend on the attitude of judges and law enforcement agencies of Kelantan to interpretation as to how effectively they might be prepared to confine the application of this Bill only to the Muslim residents of that State.

Issues over rape and the proof of zina

The Bill has come under criticism for its total silence over the problem of rape. While the Bill addressed the subject of *zina* it did not mention rape at all, presumably because rape has been dealt with in the Penal Code. However, the Bill did not say so and there was no attempt made to show how it proposed to distinguish *zina* from rape. *Zina* has, on the other hand, been given a broad definition consisting of "sexual intercourse between a man and a woman who are not married to each other and such intercourse did not come within the meaning of *wati syubhah*" (Clause 10.1). This last term signifies intercourse in doubtful but unlikely circumstances where the man might have mistaken the woman for his wife or acted in the belief that there was a valid marriage (Clause 10). In the absence of a provision to separate rape from *zina*, the broad definition of *zina* in this Bill is likely to subsume rape, in which case the two offences will fall under the same rules. This is all the more likely in view of Clause 46 (2) where it is stated that, "in the case of *zina*, pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of *zina* and therefore the *hudud* punishment shall be passed on her unless she can prove to the contrary". This has the potential of equating rape with *zina*. To apply the rules of *zina* to rape would mean that the rape victim must bring four male witnesses of just character to prove the charge against her attacker and if she fails to produce the necessary proof, then

[12] K. Haridas, "Islamization of State and Society", in Noraini Othman, (ed.), *Shariah Law and the Modern Nation State: A Malaysian Symposium*, Kuala Lumpur: Sisters in Islam, 1994, p. 99.
[13] *Ibid.*
[14] *Ibid.*

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

she would herself be liable to the punishment of *qadhf*. "To shift the burden of proof to the woman in the case of pregnancy or delivery of a child", as one commentator added, notwithstanding the fact that this clause has been the focus of public criticism and debate, "there appears to be a doggedness on the part of the State Government to retain the Clause as it has been drafted".[15]

The Bill has also been criticised for its provision concerning the witnesses of *zina* where it is stated that, "each witness shall be an adult male Muslim who is *akil baligh* (adult and competent) and shall be a person who is just" (Clause 41). Women have thus been disqualified from being a witness not only in *zina* but in all the *hudud* offences. Confession, which is the only other method of admissible proof in *hudud*, binds not only the confessor and not any other party charged with the same offence – and it can, in any case, be retracted by the accused any time "even while he is undergoing the punishment" (Clause 44). The proof of *zina* by witnesses is undoubtedly exacting, there being hardly a realistic possibility of it under normal circumstances. Then confession by the accused person which is the more likely alternative, whether in adultery or in rape, is also retractable at any stage of the proceedings.

The dilemma of the rape victim was accentuated by yet another commentator who noted that it was common among rape survivors that they did not seek medical aid immediately out of fear and shame. And it was not uncommon that the rape survivor did not struggle for fear of her own safety or the safety of others who were threatened with her.[16]

It was further stated that the Hudud Bill discriminated against women in respect of both *zina* and rape. We have already explained the plight of the rape victim. As for *zina*, a charge of *zina* against a man can be proved by four male eye witnesses or his own confession, there being no other way of proof other than this. But *zina* of a woman is provable by four male eye witnesses, or her confession, or (being unmarried) by pregnancy or delivery of a child. In the case of a married woman accused of *zina* by her husband the Bill allows her husband, through the procedure of *al-liʿan*, to disown the child, in which case the marriage will be dissolved even if the wife exercises a counter-oath to rebut the accusation of *zina* (Clauses 14 and 15).[17]

Circumstantial evidence

The Bill has also been criticised for its provision which declared that "circumstantial evidence, though relevant, shall not be a valid method of proving a *hudud* offence" (Clause 46). Material and scientific evidence, like semen stains, vaginal swabs, blood samples, scratch marks, genetic fingerprinting, etc. are

[15] Rose Ismail, at n. 11, *supra*.

[16] Salbiah Ahmad, "An Issue Paper of Zina and Rape under the Syariah Criminal Code (II) Bill 1993 (Kelantan)", presented to a forum at the Institute of Strategic and International Studies, 19 January 1993, p. 8. A summary of this paper was also reported in the *New Straits Times*, of Kuala Lumpur, by Mazlan Nordin, 19 October 1993.

[17] Salbiah Ahmad, n. 16, at 7.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

therefore not admissible as methods of proof in *zina*. The Bill thus rejects circumstantial evidence as a method of proof in *zina* on the one hand and then admits pregnancy or birth of a child – both being circumstantial evidences – as proof of *zina* on the other.

The ulama have differed as to the evidential value of pregnancy in the proof of *zina*. The majority of jurists have classified pregnancy as a circumstantial evidence (*qarinah*) indicating the occurrence of *zina* on the part of an unmarried woman or one who is married but where her husband is incapable of being a fertile partner, or when there is childbirth within the first six months of marriage. Pregnancy is not a decisive circumstantial evidence (*qarinah qatiʿah*) in that it cannot on its own be the basis of adjudication, but it is a *qarinah* which can be rebutted and overruled by other evidence. The law thus leaves open the possibility of its rebuttal and the court may hear evidence to prove that pregnancy has occurred without *zina*, or that sexual intercourse has occurred under duress by mistake or even without the knowledge of the defendant. When this is proven the *hadd* of *zina* must be suspended, and there may well be no case for any punishment, *hadd*, or *taʿzir*. Should there be a possibility that the pregnancy has occurred without penetration, the *hadd* punishment must again be suspended. This may happen, for example, when semen is planted in a woman by artificial methods, either by her or by another person, or through sex without penetration. The case will be all the more credible if the woman is still found to be a virgin. The Imams Abu Hanifah, Shafiʿi and Ibn Hanbal have held that when all of these possibilities are eliminated, the woman should be asked if she has any explanation and if she herself claimed that she was either mistaken or compelled the *hadd* will be suspended. There will be no *hadd* punishment even if she did not make such a claim so long as she has not made a full confession, for the *hadd* can only be enforced by two methods of proof, namely witness or confession.[18]

The majority position of admitting pregnancy as a circumstantial evidence is based on the saying of the Companion (*qawl al-sahabi*), a statement in particular of the caliph ʿUmar b. al Khattab who is reported to have said that "*rajm* is obligatory on anyone who commits *zina*, man or woman, provided that they are *muḥṣan* and that it is proven by witnesses, pregnancy or confession".[19]

Imam Malik has, however, considered pregnancy as a conclusive proof of *zina* above the category of circumstantial evidence or *qarinah*. The emergence of pregnancy is thus enough to invoke the *hadd* punishment without confession. Moreover, the defendant's claim as to compulsion and mistake will not be enough to suspend the *hadd* unless it is confirmed by supportive evidence. The Maliki jurist al-Dusuqi thus wrote that pregnancy was a proof of *zina* in respect of an unmarried woman or one who was married but the husband was incapable of being a fertile partner in conjugal relations. Thus a woman who is married to a *majbub*,

[18] Muwaffaq al-Din ibn Qudamah, *Al-Mughni*, Beirut: Dar al-Kitab al-ʿArabi, 1403 (1983), X, 192; ʿAbd al-Qadir ʿAwdah, *Al-Tashriʿ al-Jina'i al-Islami*, Beirut: Dar al-Kitab al-Arabi, II, 441.

[19] ʿAwdah, n. 18, at II, 441 and 339.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

that is a man whose sexual organ is mutilated, or when a married woman gives birth before the expiry of six months from the date of her marriage, she is regarded, to all intents and purposes, as unmarried and her pregnancy will be taken as proof of *zina* against her. If she claims compulsion and rape, her claim is not to be admitted and she is liable to punishment unless her claim is supported by circumstantial evidence such as screaming and calling for help. Signs of violence, and bleeding, from loss of virginity or otherwise, is circumstantial evidence, and so is the fact of her alerting others calmly, that is without screaming, at the time of the incident. It is then added that, "the best method of defence is for her to prove her claim of compulsion by the testimony of witnesses.[20]

The possibilities of accident, error and abuse are in many ways greater today than they were in pre-modern times. I will mention only some of the well-known advances in medicine, such as the availability of artificial insemination and test tube pregnancy, and of semen banks which keep alive and preserve semen for very long periods, and the possibility also that people are often prepared to spend large sums of money either to obtain what they might want or to falsify and fabricate. Although virginity cannot survive actual childbirth, it is possible, according to expert opinion, for sexual intercourse, and also pregnancy, to take place and the hymen to remain intact. Modern medicine has also made it possible to repair, through surgery, the hymen after perforation. The availability of modern medical facilities pertaining to pregnancy, pre-natal care and childbirth has meant that women tend to spend more time in hospital beds and outside the home environment. They are often put under anaesthetics or pain relieving drugs, and so on. Under these circumstances the possibility is even greater for sexual intercourse to take place without a woman's knowledge or even with her knowledge but in circumstances of impaired capacity. It would therefore seem rather presumptuous, and here we refer particularly to Maliki law, to regard pregnancy as a conclusive proof of *zina*.[21]

Issues over apostasy (irtidad)

There are two issues over the position taken in the Hudud Bill on *irtidad*, firstly that the definition of *irtidad* is so vague and general as to be lacking in focus and unless it is given a context, it is likely to conflict with both the Qur'an and the provisions of the Constitution of Malaysia on the basic freedom of religion. The definition of apostasy under the Bill is also broad enough to lump together a variety of different concepts such as blasphemy, apostasy, disbelief (*kufr*), and heresy (*bidʿah*), all under the same definition.

The second issue is over the total neglect in this Bill of a body of opinion among

[20] Sham al-Din Muhammad 'Arafah al-Dusuqi, *Hashiyah al-Dusuqi 'ala al-Sharh al-Kabir*, Cairo: 'Isa al-Babi al-Halabi, n. d., IV, 319; see also 'Awdah, *Al-Tashrʿ*, n. 18, at I, 373.

[21] I would like to record my appreciation to Dr Abdur Rahman of the International Islamic University Malaysia's Medical Centre for an informal interview I had with him at the IIUM campus on 10 September 1994.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

the ulema that has been known to exist ever since the early days of Islam: the view that apostasy is not a *hudud* but a *ta'zir* offence is founded on the fact that the death punishment for apostasy is not a Qur'anic mandate. Similarly, the Hadith that provided the sole authority for the death penalty is open to interpretation – which needs to be provided, if it were to be enforced at all. The main Hadith on the issue is that "whoever changes his religion shall be killed".

Would it then be right to say that a Jew who converts to Islam or a Hindu who becomes a Christian should be liable to the death penalty? According to the rules of interpretation that are expounded is *usul al-fiqh*, once a decisive ruling of the text has been interpreted in some respect the ruling remains open to further levels of interpretation.

The Bill defines *irtidad* as "any act done or any word uttered by a Muslim who is a *mukallaf*, being an act or word which according to Syariah law, affects or which is against the *'aqidah* (belief) in Islamic religion" (Clause 23 (1)).

The Bill goes on to specify that the act or word in question must be voluntary and that there must be no compulsion. It is further provided that the acts or words that affect the *'aqidah* must be such that concern "the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim ... pertaining to the Rukun Islam, Rukun Iman, and matters of *halal* (the allowable or the lawful) or *haram* (the prohibited or the unlawful)" (Clause 23). These expressions are all too imprecise and broad to form the basis of definition. There is also nothing in these provisions to draw a distinction between apostasy and blasphemy. The sum total of this approach would be that there will be no difference, for the purpose of enforcing the death penalty under this Bill, between a simple conversion which is neither contemptuous nor hostile and one which inflames the masses of Muslims and is capable of causing bloodshed and uncontrollable civil strife.

As for the Hadith just quoted, it may be specified and the death punishment therein may be reserved for apostasy which is accompanied by active hostility to the community and its leadership of a kind that amounts to high treason (*hirabah*).[22] There is, in fact, authority for this interpretation in another Hadith in which it is clearly stated that the life of a Muslim may be taken in three cases: murder, *zina* by a married person, and "one who renounces his religion while splitting himself off from the community (*mufariq lil-jama'ah*)".

A number of prominent ulema across the centuries have taken the view that apostasy is not a *hadd* offence. Ibrahim al-Nakha'i (d. 95 H) and Syfyan al-Thawri (d. 162 H) have held that the apostate should be invited to Islam and should never be condemned to death. The Maliki jurist Ibn al-Walid al-Baji (d. 494) and the Hanbali jurist Ibn Taymiyyah have held that apostasy is a sin which carries no *hadd* punishment and that a sin of this kind may be punished only under the

[22] Yahya b.'Ali al-Shawkani, *Nayl al-Awtar Sharh Muntaqa al-Akhbar*, Cairo: Mustafa al-Bab al-Halabi, n. d., VII, 218–219.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

discretionary punishment of *ta'zir*.[23] The late Shaykh of al-Azhar, Mahmud Shaltut, analysed the relevant evidence in the sources and drew the conclusion that apostasy carried no temporal punishment because in reference to apostasy the Qur'an only speaks of punishment in the hereafter. Shaltut also concurred with the analysis that the key factor in the Hadith which prescribed the death penalty for apostasy was "aggression and hostility against the believers and the prevention of a possible *fitnah* (sedition, civil strife) against the religion and state".[24] Mahmassani has also made a similar observation saying that "the death punishment was not meant to apply to a simple change of faith but to punish acts such as treason, joining forces with the enemy, and sedition".[25]

It is simply remarkable that the Hudud Bill which was drafted, we are told, by a committee of prominent scholars of *Shari'a*, should ignore important issues on which the ulema have made impressive contributions of a kind that relate more meaningfully to the contemporary conditions of Malaysia and beyond. To turn a blind eye to their *ijtihad* and offer no alternative other than unquestioning imitation can hardly be recommended.

Definition of muḥṣan

This is yet another feature of the Bill where a reconsideration of the conventional *fiqhi* position was called for. The Bill defines *muḥṣan* as a person who is "validly married and has experienced sexual intercourse in such marriage". A *ghairu muḥṣan* is on the other hand one who is not married or "is already married but has not experienced sexual intercourse in such marriage" (Clause 10).

It is difficult to understand that a person is a "*muḥṣan*" for the purposes of this Bill if he or she has at any time experienced sexual intercourse, there being no reference to the current state of the marriage at the time when the offence is committed. It thus matters little if a person, although once married, has separated or even divorced and had no access to his/her spouse for a long time. If the logic of imposing a severe punishment on a married person is that he or she can have lawful sexual relations with his or her spouse, then this logic can only hold if the culprit has committed *zina* during a valid and effective marriage. But if the reason behind this punishment (death by stoning), is that the person has experienced lawful sexual relations, even if only once, then it is difficult to understand the continuity of the state of *ihsan* in such a case.[26] Muhammad Abduh and his disciple Rashid Rida have held that the punishment of *zina* is only applicable to offenders who at the time of committing the offence were parties to a valid marriage. As for the

[23] Ibn Taymiyyah, *Al-Sarim al-Maslul*, Muhayy al-Din 'Abd al-Hamid, (ed.), Beirut: Dar al-Kitab, 1398//1978, p. 318; 'Abd. al-Wahhab al-Sha'rani, *Kitab al-Mizan, Cairo: Matba'ah al-Husayniyyah,* 1329 H, II, 134.

[24] Mahmud Shaltut, *Al-Islam Aqidah wa Shari'ah*, Kuwait: Dar al-Qalam (*c.* 1963), pp. 292–293.

[25] Subhi Mahmassan, *Arkan Huquq al-Insan fi'l-Islam*, Beirut: Dar al-'Ilm lil-Malayeen, 1979, pp. 123–124.

[26] *Cf.*, Mohamad S. el-Awa, *Punishment in Islamic Law*, Indianapolis: American Trust Publications, 1982, p. 19.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

offender who has been married once but is no longer so, he or she should be punished lightly or at most only the same as that of the unmarried offender.[27]

The *fuqaha* have premised the distinction between *muḥṣan* and non-*muḥṣan* on the somewhat exacting rationale that once a person has experienced the bounty and joy of marriage he is bound to be eager to safeguard and protect the sanctity of that precious relationship.[28] What about the other side of this argument: one who has experienced such a relationship but has seen it terminated or dissolved is likely to find it even harder to resist the temptation!

Abu Zahrah has concluded from his own enquiry into this issue that there is no clear text to determine that a woman who has been divorced or a man whose wife has died should be classified as *muḥṣan*. Abu Zahrah also refers to the views of Muhammad Abduh and Rashid Rida and then concurs with them in saying that "a *muḥṣan* is a person who is protected, in the case of a woman, by her husband and when there is a separation, or divorce, she no longer qualifies as a *muḥṣanah* in the same way as she is no longer a *mutazawwijah*, or a married woman".[29]

The punishment of theft

The Bill penalises the first offence of theft with amputation of the right hand from the wrist. The second offence of theft is punishable with amputation of a part of the left foot "in the middle of the foot in such a way that the heel may still be usable for walking and standing" (Clauses 6 and 52).

The leading schools of *fiqh* have admittedly validated amputation of the left foot for the second offence. But this is disputable, and there is a minority opinion against it, for the simple reason that the Qur'an has not validated it. Two prominent Companions, Ibn 'Abbas and 'Ata, are reported to have held that no further amputation is valid for the second (and subsequent) theft, and supported this by citing the Qur'anic text, "And your Lord is never forgetful" (Maryam, 19:64). Ibn Hazm has strongly criticised the majority ruling here and said that it is quite remarkable that such drastic positions are taken (mainly by the Hanafis and Malikis) without there being any evidence in the sources to support them.[30] El-Awa's enquiry into this has also led him to the conclusion that the minority opinion here is "nearest to the spirit of Islamic law".[31] Our guideline on this issue should surely be the Hadith of the Prophet, discussed below, that if there is a choice between leniency and severity, we should, in the context of punishments especially, adopt the course which leads to leniency and not otherwise.

[27] Muhammad Rashid Rida, *Tafsir al-Manar*, 4th edn, Cairo: Matba'ah al-Manar, 1373 H, V, 25.

[28] 'Ali Ahmad Mar'i, *Al-Qisas Wa'l-Hudud fi'l-Fiqh al-Islami*, 2nd edn, Beirut: Dar Iqra, 1402/1982, p. 64.

[29] Muhammad Abu Zahrah, *Al-Jarimah Wa'l-Uqubah fi'l-Fiqh al-Islami:al-Uqubah*, Cairo: Dar al-Fikr al-'Arabi, n. d., pp. 101–102.

[30] Ibn Hazm al-Andalusi, *Al-Muhalla*, A.G. Sulayman al-Bandari (ed.), Beirut: Dar al-Kutub al-'Ilmiyyah, 1468/1988, XII, 62; Ali A. Mansur, *Nizam al-Tajrim wa'l 'Iqab fi'l-Islam*, Madinah Munawwarah, Mu'assasah al-Zahra, 1396/1976, p. 331.

[31] El-Awa, n. 26, *supra*, at 6.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

The Bill has completely ignored the possibility of *tawbah* or repentance and this issue is further discussed in the context of *tawbah* below. It has also not taken into account the arguments of al-Qaradawi, al-Ghazali, and al-Zarqa, about the punishment of theft in modern society. The drafters of this Bill seem to have merely translated al-Mawardi's, *Al-Ahkam al-Sultaniyyah*, with no effort at *ijtihad* nor consideration of the realities of modern life in Malaysia. I have also quoted below Abu Zahrah, Maududi, El-Awa, and Bassiouni, all of whom raise serious doubts as to whether justice would be served by the implementation of these penalties in contemporary Muslim societies.

Should drinking wine be a hadd?

The basic issue over *shurb* is that it does not belong in the category of *hudud*, and that the evidence for classifying it under the *hudud* is controversial. The Bill has, of course, identified *shurb* as a *hudud* offence which is punishable with "whipping of not more than eighty lashes but not less than forty lashes" (Clause 22).

Although *shurb* has been declared forbidden in the Qur'an, the latter has not specified any particular punishment for it. The evidence in the Sunnah also indicates that the Prophet has not treated *shurb* as a *hadd* offence. Drinking wine was a common habit among the Arabs which is why the Qur'an initially adopted a persuasive approach advising people of the ill-effects of drinking wine and subsequently discouraged it nearer the prayer time, and it was only in the third of the three separated *ayat* that it was declared totally forbidden. The Prophet s.a.w. also imposed different types of punishments for *shurb*, and reports indicate that offenders were in most cases subjected to beating.

Reports further confirm that when Abu Bakr was faced with the issue he asked the Companions but they did not know of any precise punishment for *shurb*. Notwithstanding this, and confirmation by a number of ulema, including Ibn Qayyim, al-Jawziyyah, Al-Shawkani, and Ibn Farhun, the majority of jurists have not only classified *shurb* as a *hadd* offence but have claimed a general consensus (*ijma'*) on its punishment to have been fixed at 80 lashes – which is evidently not the case. In their recent writings scholars, including Mustafa Shalabi, Fathi Bahnasi, Salim al-Awwa, and others, have stated that the alleged *ijma'* on *shurb* being a *hadd* offence is incorrect and have held that it is a *ta'zir* offence. The basic argument for this being that *hadd* is by definition an offence for which a fixed punishment is prescribed in the Qur'an or Sunnah.[32] When this is not the case, the whole concept of *hadd* collapses.

Issues over qadhf

Clause 12 of the Hudud Bill defines *qadhf* as making an accusation of *zina* against a Muslim of upright character which is not proven by four witnesses. The offence

[32] *Cf.*, Bahnasi, n. 34, *infra*, at 25; el Awa, n. 26, *supra*, p. 48.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

carries a fixed punishment of 80 lashes and also the offender's "testimony shall no longer be accepted until he repents".

The Bill is totally silent on the point as to whether the wishes of the victim of *qadhf* (*maqdhuf*) has any role in the enforcement of the prescribed punishment. According to the general agreement of the leading *madhahib*, the punishment of *qadhf* is not enforceable unless it is requested by the *maqdhuf* and if the latter forgives the offender, there will be no punishment. The Imams Shafi'i and Ibn Hanbal have held that *qadhf* consists of the violation of the right of Man and it resembles *qisas* both of which are amenable to pardoning by the victim. It is also a requirement on which almost all the schools are in agreement that the victim of *qadhf* needs to file a complaint against the offender and it is only then that judicial proceedings can take their course which might lead to the enforcement of the *hadd* of *qadhf*. But *qadhf* according to the Imams Abu Hanifah and Malik belongs to the Right-of-God category of offences, which means that no pardon may be granted by anyone after the matter has been brought to the attention of the court.[33]

It would undoubtedly bear greater harmony with the letter and spirit of *Shari'a* on the subject of *hudud* to open up all the avenues whereby a *hadd* punishment could be mitigated or dropped. One such avenue would have been to make a provision whether or not the victim of *qadhf* wishes that the punishment should be carried out. Failure to do so, which is the case in the proposed Bill, marks a departure from the purport of the Hadith discussed below, which provides that making an error on the side of leniency is preferable to making an error on the side of severity.

AN ANALYSIS OF HADD IN THE QUR'AN AND FIQH

This part of the article explores the validity or otherwise of the hypothesis that the juristic concept of *hadd* which the *fuqaha* have presented and developed tends to differ with what it means in the Qur'an. It is contended that some of the rigidities that are attendant in the juristic doctrine are not Qur'anic.

Hadd in the Qur'an

Hadd literally means boundary or limit which separates and prevents one thing from intruding on another. Fixed punishments are known as *hudud* because they are meant to prevent crime and signify the limits of what is tolerable and what is not. And then *hadd* is also used in reference to the crime itself, such as by saying that so and so committed a *hadd*.[34] *Hudud* Allah is a familiar expression which

[33] 'Ala al-Din al-Kasani, *Bad'i al-Sana'i fi Tartib al-Shara'i'*, Cairo: Matba'ah al-Jamaliyyah, 1328/1910, XII, 62; Ibn Qudamah al-Maqdisi, *Al-Mughni*, Riyadh: Maktabah al-Riyadh ala-Hadithah, 1401/1981, VIII, 217; el-Awa, n. 26, *supra*, at p. 22.

[34] *Cf.*, Burhan al-Din al-Marghinani, *al-Hidayah*, Cairo: Mustafa al-Babi al-Halabi, n.d., II, 94; Shams al-Din al-Sarakhsi, *al-Mabsut*, Beirut: Dar al-Ma'rifa, 1406/1986, IX, 36; Ahmad Fathi Bahnasi, *Al-'Uqubah fi'l-Fiqh al-Islami*, 6th edn, Cairo: Dar al-Shuruq, 1409/1989, p. 123.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

occurs 14 times in the Qur'an in the typical sense of signifying the "limits", whether moral or legal, of acceptable behaviour from that which is unacceptable – in the sense for example of separating the *halal* and *haram* from one another. On no occasion has the Qur'an, however, used *hadd* or *hudud* in the specific sense of punishment, fixed or otherwise.

When we compare the Qur'anic usage of *hadd* with the use of this term in *fiqh*, we notice that a basic development has taken place, which is that the term *hadd* has been reserved to signify a fixed and unchangeable punishment that is laid down in the Qur'an or Sunnah. The concept of the "separating or preventing limit" of the Qur'an is thereby replaced by the idea of fixed punishment.[35]

Hadd according to its *fiqhi* definition is "a quantitatively fixed punishment which is imposed for a violation of the Right of God". *Hadd* is thus signified as a fixed punishment in contradistinction with *ta'zir*, which is neither fixed nor quantified. It is also a Right of God in contradistinction with *qisas* (just retaliation) which is a Right of Man. *Hadd* as a Right of God signifies a demand from God that requires fulfilment and no one therefore has the authority to pardon or suspend it.[36]

Of the 14 instances where *hudud* are used in the Qur'an, no less than six occur in just one passage on the subject of divorce, which is as follows.

Divorce (may be given) twice. Thereafter, either retain (the wife) according to good custom (*bi'l-ma'ruf*) or release her with kindness. And it is not lawful for you to take back anything you have given her unless the couple fear that they may transgress God's limits (*hudud* Allah). If there is fear that they may transgress *hudud* Allah, they commit no sin if the wife willingly gives anything back. These are *hudud* Allah, do not transgress them. Those who transgress *hudud* Allah, they are unjust. But if he (the husband) divorces her, she will not be lawful to him thereafter until she marries another man. If he (the second husband) divorces her, there is no harm if the two return to each other, if they think they can observe *hudud* Allah. And these are the *hudud* Allah which He makes clear for a people who know (al-Baqarah, 2: 229–30).

The term *hudud* Allah carries slightly different meanings in its various applications above. While the idea of limits may be said to be common to all, in its uses 2, 3, and 6, it refers to the specific injunctions contained in the body of the text. Uses 1, 4, and 5, do not refer to anything specifically stated, let alone enjoined, either here, or indeed elsewhere, in the Qur'an. In other words, when the Qur'an speaks of observing *hudud* Allah it states neither here nor elsewhere specifically what these "limits" are.

With reference to marital relations, the Qur'an demands a conduct which is in accord with good custom (*bi'l-ma'ruf*). This is not to say that there are no other injunctions concerning marital relations in the Qur'an, but for the purposes of this text, *hudud* Allah is a general reference to the total conduct of marital life which is

[35] *Cf.*, Fazlur Rahman, "The Concept of Hadd in Islamic Law", *Islamic Studies* 4 (1965), p. 237.
[36] al-Marghinani, n. 34, *supra*, at d. II, 94; al-Sarakhsi, n. 34, *supra*, at IX, 36.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

conveyed by the term *bi'l-ma'ruf*. The content of good custom in this context is thus included in the general meaning of *hudud* Allah.

Two more points to note in this passage are: firstly that the term *hudud* has no reference to punishment, but is concerned mainly with a moral situation which may or may not have legal implications. Secondly, the content of "good custom" is evidently liable to change and does not fit in with the idea of a fixed and invariable provision. This must also imply that the content of *hudud* Allah is variable to that extent and that it is conceptually amenable to comprising changeable provisions.[37]

In two other places (al-Baqarah, 2: 187 and al-Talaq 65:1) the term *hudud* Allah is concerned with marital relations; the first with conjugal relations during the fasting month of Ramadan and the second with the waiting period (i.e. *'iddah*) that the wife must observe following a divorce. The text in both places warns against violating *hudud* Allah. Elsewhere the expression occurs in a passage where the text recommends kindness to the orphans and the needy and specifies fixed shares in inheritance for legal heirs, and then declares that these are the *hudud* Allah that must be observed (al-Nisa, 4:12–13).

Hudud Allah also occurs in the Qur'an in reference to atonement (*kaffarah*) in conjunction with *zihar*. This is a form of divorce, originally a pre-Islamic practice, where the husband declares his wife to be unlawful to him 'like the back of his mother". The *kaffarah* that the husband needs to observe in the event of resuming marital relations consists of one of the following three: to release a slave, to fast for 60 consecutive days, or to feed 60 poor persons. The text then proceeds to declare that "these are God's limits (*hudud* Allah) and for disbelievers is a painful torture (al-Mujadilah, 58:3–5). It is of interest to note here the use of *hudud* Allah in reference to a specific but self-imposed punishment which does not involve the enforcement authorities but only the individual himself. Moreover, by suggesting alternative atonements for *zihar* the Qur'an seems to admit the idea of alternative/variable punishment for *hudud* Allah in line with the ability and condition of the persons who observe the *kaffarah* in question.

The "Divine Limits" (*hudud* Allah), according to Maududi, consist of certain principles, checks and balances, and specific injunctions in different spheres of life – and they have been prescribed in order that man may be trained to lead a balanced and moderate life. They are intended to lay down the basic framework within which man is free to legislate, decide his own affairs and frame subsidiary laws and regulations for his conduct.[38]

It is thus evident that the Qur'anic concepts of *hudud* and *hudud* Allah are not meant to consist of punishments, nor of purely punitive and mandatory sanctions. They are used in the Qur'an to imply a set of broad moral and legal guidelines which must be observed and upheld. The basic concern is clearly with the moral limits of conduct in the sense of identifying what is generally good and righteous as opposed to that which must be avoided and discouraged.

[37] *Cf.*, Fazlur Rahman, n. 35, *supra*, at 238.

[38] S.A.A. Maududi, *The Islamic Law and Constitution*, Lahore: Islamic Publications Ltd, Reprint, 1979, p. 142.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

The Qur'an's emphasis on repentance (tawbah)

In virtually all the four instances where the Qur'an specifies a punishment for an offence, there is also a provision for repentance, forgiveness and reformation. This is a consistent feature of the penal philosophy of the Qur'an which has, however, not been adequately reflected in the juristic doctrine of the *fuqaha*, nor indeed in the Hudud Bill of Kelantan. Notwithstanding the dual emphasis that the Qur'an lays on punishment and repentance, juristic doctrine pays undivided attention to the enforcement of punishment so much so that once the offender has been convicted of a *hadd* offence repentance is of no account and no one has the authority to pardon him. But we read a different message in the Qur'an. Thus the text (al-Ma'idah, 5:38–39) which penalises the thief with mutilation continues to provide, "But if the thief repents after his crime and amends his conduct, God redeems him. God is forgiving, most merciful".

The reference to repentance in the text is immediately followed by the word '*aslaha*' (reforms himself) and the two together would seem to require that the convict should not only be given time in which repentance and reformation can occur but also that this should be facilitated, on a selective basis at least, by positive incentives.

Abu Zahrah wrote in a commentary that the Qur'anic text on theft begins with '*al-sariq wa'l-sariqah*' and these are adjectives, not verbs, and adjectives do not materialise in a person without a measure of repetition. A person is not, for example, described as "generous", "honest", or "liar", merely by a single act of generosity, honesty, or lying. These adjectives carry their full meanings when there is recurrence and repetition. The *ayah* did not begin by saying, for example, that theft is punishable with such and such a punishment; if refers instead to *sariq* and *sariqah*. When we read the *ayah* from this perspective, then the punishment that it conveys should apply to recidivists but not to first time offenders. According to a report when the Caliph 'Umar al-Khattab decided to mutilate the hand of a young offender, his mother said: "pardon him O Commander of the faithful, because it was his first time". To this the Caliph responded, "Allah is too merciful to reveal the nakedness of His servant for his first failure". Abu Zahrah has also discussed, in this connection, the issue of repentance where he observed that the wording of the text before us is such that repentance can only find a logical place in it, if it is given an opportunity before the imposition of punishment. This he adds is not the view of the majority but it is a view that is sustainable by the text and some ulema have in fact arrived at this conclusion.[39]

The Qur'anic emphasis on *tawbah* can also be seen it its *ayat* on adultery and slanderous accusation (al-Nur, 24: 2–6) respectively: reference to punishment in each case is immediately followed by "unless they repent thereafter and mend their conduct" and "except for those who repent thereafter and reform themselves". And then with reference to highway robbery, we also note that the text expounds

[39] Abu Zahrah, *Al-'Uqubah*, n. 29, *supra*, pp. 134–136.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

three types of punishments for this crime and then immediately provides: "Except for those who repent before they fall into your power. In that case know that God is forgiving, most merciful".

It is thus evident that the Qur'an leaves the door of reformation and repentance open in all of the *hudud* offences without any exception or reservation. To deny this opportunity is clearly tantamount to overruling what is conveyed in the clear text.

Juristic views on repentance

The jurists have held three different views on repentance which may be summarised as follows:

(1) The first view maintains that repentance suspends the prescribed punishments, if it is offered prior to the completion of the offence and that the offence in question belongs to the right of God category *hudud*. Some jurists of the Shafi'i and Hanbali schools who subscribe to this view have done so by way of analogy to highway robbery (*hirabah*). It is thus argued that *hirabah* is the most serious of all crimes and if repentance in this crime is admissible, as is stipulated in the clear text, then the argument for its admissibility is even stronger in lesser crimes, namely of *zina, shurb*, and theft. The proponents of this view have also referred to a Hadith in which the Prophet has said: "One who repents for a sin is like one who has committed no sin". It therefore follows that one who is not guilty of a sin is not liable to its punishment either. The Prophet has also said concerning the renowned case of Ma'iz b. Malik, when he was informed that Ma'iz ran away (while being stoned for *zina*): "Did you not leave him alone to repent so that Allah would have granted him a pardon?".[40] Among the proponents of this view some have further elaborated that repentance, in order to be admissible and convincing, should be accompanied by correction in conduct and this would require time (some suggest a period of six months, whereas others only say a long time) in which the sincerity of repentance can be ascertained and testified.[41]

(2) The second view, which is held by the Imams Malik and Abu Hanifah as well as some Shafi'i and Hanbali jurists, has it that repentance has no bearing on the *hudud*, except in the case of highway robbery which is based on clear text. This view is premised on the argument that the wording of the Qur'anic *ayah* concerning the punishment of *zina* and theft are general (*'am*) which must apply to repenters and non-repenters alike. The proponents of this view maintain somehow that the references to repentance in the Qur'anic *ayat* on theft and adultery are concerned with repentance after the

[40] *Cf.*, Ibn Qudamah, *Al-Mughni*, n. 33, *supra*, at I, 316; 'Awdah, *Al-Tashri'*, n. 18, *supra*, at I, 353: Abu Zahrah, *al-'Uqubah*, n. 29, *supra*, at 250.
[41] *Ibid.*

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

imposition of punishment and not before. To this it is further added that when the Prophet ordered stoning in the cases of Ma'iz and al-Ghamidyyah, or when he adjudicated in certain cases of theft, on the basis of confession, the offenders in these cases had all shown signs of repentance as many of them had said that they wished to be purified of their sins but that the Prophet nevertheless enforced the *hadd* punishment on them.[42]

(3) The third view, which is mainly attributed to Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah, has it that punishment purifies one from criminality and sin, and so does repentance. That punishment should be suspended when the perpetrator of a Right of God offence repents and in the meantime does not himself insist that only punishment can purify him of his guilt. But if he does so insist, then he or she may be punished even after repentance. Hence, when the perpetrator of a *hadd* offence repents prior to completing the crime, he or she will not be punished if the offence in question is a public right, or Right of God, offence, provided also that the offender does not demand to be punished.[43]

When we look at the evidence in the Sunnah we find that the Prophet has on many occasions tried to persuade individuals who had confessed to a *hadd* offence to retract their confession and find a way out for them of their punitive predicament, presumably because confession is often indicative of repentance and the Prophet s.a.w. has positively encouraged it. Notwithstanding this, only in the case of apostasy can it be said that repentance has found a place in the juristic doctrine, but only just so, because imposing a strict time limit of three days (*cf.* Clause 23[3] of the Hudud Bill) within which the offender must repent is really reducing the concept of repentance into a mechanical formality that is almost meaningless.

Juristic thinking over the *hudud* were caught, as from early times it seems, in a web of technicality, partly because of linking the *hudud* with the binary division of rights into Rights of God and Rights of Man in a manner that created more problems than otherwise. Juristic developments in this area have followed a course which seems to have made it difficult to integrate the Qur'anic outlook on repentance and reform to the underlying philosophy of *hudud*.

It seems that the Qur'an's repeated emphasis on repentance has caught the attention of Ibn Hazm who wrote in a distinctly different tone of language to that of the majority of ulema. Thus, according to Ibn Hazm:

Since repentance is ordained by God and it is highly recommended, it is obligatory on all Muslims (*kana fardan 'ala kull muslim*) to invoke it in accordance with the injunctions (*al-nusus*) that were discussed. Hence inviting the offender to repent prior to the enforcement of

[42] Ibn Qudamah, *Al-Mughni*, n. 33, *supra*, X, 316; Ala'uddin al-Kasah, *Bada'i' al-Sana'i'*, n. VII, 96.

[43] Ibn Qayyim all-Jawziyyah, *I'lam al-Muwaqqi'in*, Muhammad Munir al-Dimashqi (ed.), Cairo: Idarah al-Taba'ah al-Muniriyyah, n. d., II, 97–98; 'Awdah, *Al-Tashri'*, n. 18, *supra*, at I, 355.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

hadd is an obligation and diligence in it is a duty ..... If the Imam failed to invite the offender to repent prior to enforcement, an invitation to repentance should still be extended after the enforcement of *hadd*.[44]

If we were to extend the juristic concept of *hadd* to the broad Qur'anic philosophy of reformation and repentance, we would have to depart from the notion of fixed and mandatory provisions of universal application. It would be possible perhaps to combine the Qur'anic directives on reformation and repentance with the notion of fixed penalties, or a range of quantified penalties. It would be difficult, however, to integrate into this approach the notion of both fixed and mandatory sentences that are totally closed to the attendant conditions and circumstances of individual offenders.

Hadd and haqq Allah in the juristic expositions of fiqh

As already indicated the ulema have defined *hadd* as a fixed punishment imposed for violation of the Right of God. The Hudud Bill also describes *hudud* as "offences, the punishments of which are ordained by the Holy Qur'an and the Sunnah", and then it further specifies that the *hudud* punishments, "shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered" (Clause 48). The other two categories of offences with which this Bill is exclusively concerned are *qisas* and *ta'zir* offences respectively.

By defining *hadd* as a fixed punishment (*'uqubah muqaddrah*) it is meant that the punishment is invariably specified and fixed, and not fixed, as it were, in the sense of fixing the minimum and maximum limits thereof. In *ta'zir* punishment the authorities are entitled to exercise discretion as to determining the type and quantity of punishment. Protecting the vital interest of the community may be said to be the basic objective of all punishment, including *qisas*, *diyyah*, and *ta'zir*, yet while this is generally acknowledged, it is suggested that compared to the *hudud*, offences in these other categories are not crucial for protecting the basic fabric of society, and that they relate more closely to the rights and interests of individuals than that of the community as a whole.[45] 'Abd al-Qadir 'Awdah merely expounded the conventional view when he wrote that theft, *shurb*, highway robbery, rebellion, *zina*, and apostasy pose a greater threat to society than the pain and grief that might be inflicted on victims. The victim of theft may lose his property but his grief is relatively less than the threat of terror and insecurity that is inflicted on his neighbours and fellow citizens. As for crimes such as "murder and injury, they affect individuals more than society and these are to some extent personal crimes in the sense that their perpetrators do not face everyone they meet with violence but confine their aggression to a particular individual".[46] The rationale we are faced

[44] Ibn Hazm, *al-Muhalla*, n. 30, *supra*, at XII, 36.
[45] 'Awdah, *Al-Tashri'*, n. 18, *supra*, at I, 76 and 620.
[46] *Ibid.*, p. 621.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

with here does not really bear out and would in any case seem to have lost much of its relevance in conjunction with contemporary social realities, for it is hard to understand the assertion that killing and bodily injury represent a lesser threat to society than such other crimes as *zina* and *qadhf*.

When we look at the *hudud* as a separate category of punishment in contradistinction with *qisas*, we are reminded of the conditions that prevailed in the tribal society of Arabia at the time of the advent of Islam, in which the scope and manner of the application of *qisas*, where personal vendetta and tribalist urge for revenge needed to be checked and controlled. The emphasis was clearly on the objectivity of justice independent of tribalist and sectarian interests. The *hudud* would appear to have served this purpose in that they took the law in regard to a certain number of crimes out of the scope of tribal justice and the message was clearly conveyed that these are not open to negotiation, compromise and pardoning. But when we consider that the course of history has altered the picture and that changes have taken place as a result of such developments as urbanisation on a massive scale, communications, and modern methods of government etc. – we find that the basic rationale of the early distinctions has been substantially eroded. While criminality remains a serious threat to the fabric of modern society and civilisation, there is no compelling argument to confine this only to a handful of specified or unspecified crimes. The changing conditions of society have never ceased to generate new problems, new opportunities for crime, and unprecedented varieties of criminal conduct which are often no less of a threat to the basic fabric of society and its values as the *hudud* crimes.

Basically all rights in Islam, as the Maliki jurist al Qarafi pointed out, consist primarily of the Right of God, which are in turn exercised and represented by the community of believers and their lawful government.[47] We may conclude therefore that all crimes consist of the violation of the limits of God, the *hudud* Allah, and that the community and its leadership are within their rights to take all necessary measures to defend their common interests against criminality and violence without the need to draw hard and fast divisions between public and private interests. We may also say that there remains no urgent need for distinguishing the Right of God from the Right of Man, nor of *hudud* crimes on this basis alone, from other offences that are equally if not more threatening to public security and interest.

QUESTIONS OVER THE PUNISHMENT OF ZINA

A statement of issues

The ulema of the leading *madhahib* have disagreed on the subject of *ihsan* (protection) and its effects on the punishment of *zina*. Questions have arisen as to

[47] Shibah al-Din al-Qarafi, *Kitab al-Furuq*, Cairo: Matba'ah Dar al-Ihya' al-Kutub al-'Arabiyyah, 1346 H, p. 141.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

the validity or otherwise of *rajm* (stoning) for *zina* side by side with the Qur'anic punishment of flogging. There is also disagreement as to the combination of different punishments, namely of *rajm*, flogging, and banishment with one another. The majority have held that the punishment of *zina* in the case of a *muḥṣan* (a married Muslim) is death by stoning (*rajm*) as laid down by the Sunnah, and it is 100 lashes for an unmarried person, or a *ghayr muḥṣan*, which is prescribed in the Qur'an. The variant opinion on this subject, as I shall presently elaborate, maintains that the Qur'anic punishment of 100 lashes applies to everyone, *muḥṣan* and *non-muḥṣan* alike.

The first view is based on the evidence that the Prophet has applied *rajm* in the widely reported cases of Ma'iz b. Malik and al-Ghamidiyyah. This is further supported by the fact that the Pious Caliphs have applied the punishment of stoning, and their precedent is generally seen as conclusive evidence on the continued validity of this punishment.

The variant view is based on the analysis that the Qur'an has provided for a uniform punishment of 100 lashes and it is totally silent on *rajm*. Had Allah s.w.t. intended to validate *rajm* as a punishment, the Qur'an would have made a reference to it. The proponents of this view have rejected the evidence in the Sunnah by saying that the reported instances of *rajm* actually took place prior to the revelation of the Qur'anic provision in Surah al-Nur (24:2) which prescribed the punishment of flogging. If this is accepted it would mean that the Qur'anic provision on flogging had in effect abrogated *rajm*. Then there is the argument that the evidence in the Sunnah is all in the form of solitary (*Ahad*) Hadith, and the fact that there is inconsistency and conflict in the contents of these *ahadith* only serves to aggravate the situation further.

To discuss all the relevant *ahadith* would be beyond the scope of this article. I can only state that some of the *ahadith* reported in al-Ghamidiyyah's case contain a reference to banishment (*al-taghrib*) as a supplementary punishment to *rajm* but that this element is absent in other *ahadith* concerning the same case. There is a similar discrepancy in the *ahadith* on the question of combining *rajm* respectively with flogging and banishment. In some reports flogging seems to have been applied as a supplementary punishment to *rajm* but there are other *ahadith* in which *rajm* is mentioned as the only punishment without making any reference to flogging.[48]

Ali Mansur, the author of *Nizam al-Tajrim wal-'Iqab fil-Islam*, a former President of the Constitutional Court of Egypt and Chairman of the Committee on the Harmonisation of Shari'a and Law wrote that: "Muhammad Abu Zahrah, who is one of the leading ulema of *Shari'a* this century has sent to me in writing his opinion on the subject of stoning where he concluded that the evidence for this

[48] For a discussion of the relevant *ahadith* on the punishment of *zina* see al-Shawkani, *Nayl al-Awthar*, VII, 97–100; see also for these and other *ahadith*, Jamal al-Din al-Zayla'i, *Nasb al-Raya li-Ahadith al-Hidayah*, 2nd edn, Beirut: Al-Maktab al-Islami, 1393 H, III, 328–383; al-Sarakhsi, *al-Mabsut*, n. 34, *supra*, at IX, 36ff.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

punishment was doubtful and it was therefore preferable not to apply it".[49] Mansur added that Abu Zahrah expressed his views in a conference in the Moroccan city of Dar al-Bayda on the 22nd of Rabi al-Awwal 1392 H, corresponding to 6 May 1972. Abu Zahrah's views on this issue have also to a large extent appeared in his own book (published earlier in 1959) which may be summarised as follows:

(1) There is no disagreement among the jurists and ulema of the four leading *madhahib* that the punishment of flogging for *zina*, prescribed in the Qur'an, applies to unmarried men and women who are referred to in the Qur'an as *ghayr muḥṣan*. The majority (*jumhur*) of jurists have added that a male fornicator is also liable to banishment, that is removal from society, or imprisonment, for a year so that he is not ostracised for what he has done and that in the course of time people may forget about it. Imam Malik has held that banishment should not apply to women convicted of *zina* for fear obviously of immorality and corruption.[50]

(2) As for the punishment of stoning for a married person, Abu Zahrah refers to the relevant *ahadith*. But then he notes that all of these *ahadith* are *Ahad* and the mere fact that there are several of them does not elevate them to the rank of *mutawatir*. Only the *mutawatir* inspires conviction and precludes the possibility of lying and doubt in the transmission of *Hadith*.

(3) Abu Zahrah draws attention to the Hadith recorded in *Sahih al-Baukhari* that one of the Followers (*tabi'un*) asked a *mujtahid* among the Companions whether the Surah al-Nur, which prescribed the punishment of flogging, was revealed before the *ahadith* on stoning or whether these latter came after Surah al-Nur. The Companion answered that he did not know. The person who asked the question was al-Shaybani and the Companion was Abd Allah Ibn Abi Awfa.[51]

The ulema of Hadith have, however, attempted to resolve the doubt raised in this report by saying that the *ahadith* of *rajm* came after the revelation of Surah al-Nur and therefore abrogated the latter, which is why 'Uma al-Khattab acted on the ruling of these *ahadith*.

(4) At this point Abu Zahrah relates the views of the Kharijites, some Shi'ah and Mu'tazillah to the effect that there is no other punishment for *zina* other than flogging. They have further argued that stoning is the most severe of all punishments, it should therefore be proven by decisive evidence, that is either the Qur'an or Hadith *mutawatir*, and all the *ahadith* or *rajm* fall short of *mutawatir*. Added to this is the doubt expressed by a Companion as to whether the stoning of Ma'iz and al-Ghamidiyyah preceded or succeeded

[49] Mansur, *Nizam*, n. 30, *supra*, at 181–182.
[50] *Ibid.*, pp. 182–183; Abu Zahrah, *Al-'Uqubah*, n. 29, *supra*, at 98 ff.
[51] *Sahih al-Bukhari*, Muhsin Khan's trans. at VII, 527, Hadith 804; Abu Zahrah, *Al-'Uqubah*, n. 29, *supra*, p. 100; Mansur, *Nizam*, n. 30, *supra*, pp. 182–183.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

the Qur'anic text in Surah al-Nur. *Rajm* as a punishment thus collapses on the basis of the rule that doubts invalidate the *hudud*.[52]

Ali Mansur added that another prominent jurist, Professor Mustafa al-Zarqa, was present at the same conference and heard Abu Zahrah's views on the subject of *rajm*: He too (al-Zarqa) sent his opinion in writing to me to the effect that stoning as a punishment in *zina* should not be enforced, not because of the doubt in the authenticity of Hadith but because it is quite possible that stoning was imposed as a *ta'zir* punishment. Al-Zarqa then added that this was also the opinion of Shaykh Mahmud Shaltut. The text of al-Zarqa's letter contained the following:

In my view there is a distinct possibility that the Prophet s.a.w. ordered *rajm*, in the related incidents by way not of *hadd* but of *ta'zir* punishment. For he saw under the circumstances that only a strong and decisive stand on this issue could curb the rampant immorality and corruption of the time of ignorance. The lawful government and the *ulu al-amr* are within their rights to introduce *ta'zir* punishment in their efforts to combat criminality and to secure benefit for the community. It is likely that the Prophet s.a.w. also exercised his authority in this way and introduced *rajm* as a *ta'zir* punishment.[53]

Our review of the evidence in the *ahadith* tends to confirm al-Zarqa's observation. For a period of time when there was no definitive ruling on a fixed punishment for *zina*, that is prior to the revelation of Surah al-Nur in the year 4 or 5 Hijrah, it would appear that *rajm* was not a *hadd* punishment. If there were instances of its application around that time it was clearly on a discretionary basis. Supposing that the Prophet employed *rajm* in those years by recourse to the ruling of the Torah, that by itself would not render it into a *hadd* punishment either and it would still be reasonable to think that it was applied on a discretionary basis until the revelation of Surah al-Nur. Whether the Qur'anic *hadd* was subsequently and partially abrogated or specified in a certain way and how this was done, whether by the Qur'an itself or by the Sunnah, and in what chronological order, are among the widely debated questions, and the answers they have received are not totally devoid of uncertainty and doubt.

ISLAM AS A TOTAL SYSTEM

The implementation of *hudud* is generally seen as a necessary component of the Islamic resurgence movement and it is, as such, by no means confined to Kelantan or to Malaysia. A number of prominent scholars have spoken on the subject and I propose here to review the salient points of what they had to say. There are those of course who maintain that the implementation of *hudud* offers a good answer to

[52] Abu Zahrah, n. 29, *supra*, pp. 100–101: 'Awdah, *Al-Tashri'* n. 18, *supra*, II, 380. See also al-Sarakhsi, *Al-Mabsut*, n. 34, *supra*, at IX, 45.

[53] Mansur, *Nizam al-Tajrim*, n. 30, *supra*, at 182–183. Despite my effort locate al-Zarqa's views independently in his own writings, my search was unsuccessful.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

the problem of rising criminality and that, in any case, Muslims have no choice in the matter of implementing God's law. We have also seen, on the other hand, a general expression of concern that implementing the *hudud* under contemporary conditions where the individual is surrounded by an endless series of temptations might amount to oppression and injustice. It is widely accepted that Islam is a way of life and if implemented in its entirety, that by itself tends to operate as a major deterrence against crime. But to say that one can achieve Islamic criminal justice in an alien environment is not only unrealistic but is most likely to produce the opposite results and frustrate, rather than satisfy, the Islamic vision of justice and fair play.

"A remarkable fact about the *Shari'a*", according to Maududi, is that it is "an organic whole" and any arbitrary and selective division of the general scheme of *Shari'a* is therefore "bound to harm the spirit as well as the structure of the *Shari'a*".[54] There were people, Maududi added, who selected a few provisions of the Islamic penal code for implementation without realising that those provisions need to be viewed against the background of the whole Islamic system of life. To enforce those provisions "in isolation would in fact be against the intention of the Lawgiver".[55]

With reference to the amputation of the hand for theft, Maududi added that the punishment is "not meant for the present-day society where you cannot get a single penny without having to pay interest; where in place of Baitul Mal, there are implacable money-lenders and banks" which treat the poor with brutal contempt. In a world where everyone is out for himself, where the economic system leads to the enrichment of the few at the cost of crushing poverty of the many – "enforcing the *hadd* of theft would amount to protecting the ill-gotten wealth of the exploiters".[56]

As for the *hadd* of *zina*, it is meant for a society where marriage is made easy, where traces of suggestiveness are nullified, and where virtue, piety, and remembrance of God, are kept ever fresh in the minds and hearts of people. It is not meant for a society where "sexual excitement is rampant, where nude pictures, obscene books, and vulgar songs, have become common recreation", where economic conditions and social customs have made marriage extremely difficult.[57]

In his book, *Punishment in Islamic Law*, Salim el-Awa has quoted Maududi and confirmed his analysis to the effect that Islam envisages a comprehensive scheme of values for society. What has happened is that many Muslim countries have borrowed the penal philosophy of an alien system. Under such circumstances, it is totally wrong, el-Awa adds, to attempt to enforce the *hudud* as an isolated case. It does not make sense under the present circumstances, el-Awa adds, to amputate

[54] S.A.A. Maududi, *The Islamic State and Constitution*, 8th printing, Lahore: Islamic Publication Ltd, 1983, p. 52.
[55] *Ibid.*, p. 55.
[56] *Ibid.*, p. 54.
[57] *Ibid.*, p. 55.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

the thief's hand when he might have no means of livelihood, or to "punish in any way for *zina* (let alone stoning to death) in a community where everything invites and encourages unlawful sexual relations".[58] El-Awa then concludes: "One can say that the application of the Islamic penal system under the present circumstances would not lead to the achievement of the ends recommended by this system".[59] Commenting on the punishment of theft, Cherif Bassiouni wrote that a thief is one who steals in a "just society, which eliminates needs", where the punishment may be appropriately deterring. The punishment is "not necessarily applied in a society which does not have the characteristics of being just".[60]

The social policy orientation of Islamic criminal law can clearly be seen in the source evidence especially the fact that the Prophet s.a.w. and the Pious Caliphs have taken into account the prevailing political and economic conditions of the community in the enforcement of *hudud*. *Hudud* were not to be enforced, on the authority of Hadith, in times of military engagement with the enemy forces, as there would otherwise be the danger of defection, disunity and military weakness, values that evidently commanded higher priority than enforcing the *hudud* punishments. We also note that the Caliph 'Umar al-Khattab suspended, once again on the authority of Hadith, the *hadd* penalty of theft during the year of the famine for the obvious reason that enforcing the *hadd* under such circumstances would be unjust.[61]

The all-embracing character of Islam and its *Shari'a* were underlined in a recent article by Abdullah al-Khalifah who stated that Islam provided comprehensive instructions not only on devotional matters but on social relations within and outside the family. It laid emphasis on enjoining good and preventing evil, kindness to parents and relatives, treating neighbours, orphans, the poor, and wayfarers properly and taking care of their possessions.[62] It seems clear, al-Khalifah concludes, that religious observances act as a disincentive to crime so much so that a religious person would consider criminality a violation of God's law, and contrary to his/her religious beliefs.[63]

Commenting on the *hadd* of adultery, al-Qaradawi has also underscored the change of environment and the temptations that modern society has created. We have, on the one hand, the high, and in some places, exorbitant costs that are incurred in marriage, dower, and what follows, that is providing a house and furniture etc., and, on the other hand, the numerous other temptations that tax the limits of individual self-restraint:

[58] S. el-Awa, *Punishment in Islamic Law*, n. 26, *supra*, at 136.
[59] *Ibid.*
[60] M. Cherif Bassiouni, *The Islamic Criminal Justice System*, London: Oceana Publications, 1982, p. 5.
[61] Al-Sarakhsi, *Al-Mabsut*, n. 34, *supra*, IX, 141; Yusuf al-Qaradawi, *Shari'ah al-Islam Salihah li'l-Tatbiq fi Kull Zaman wa Makahh*, Cairo: Dar al-Sahwah, 1393 H, p.35.
[62] Abdullah H.H. al-Khalifah, "Religiosity in Islam as a Protective Mechanism Against Criminal Temptation", *The American Journal of Islamic Social Sciences*, 11, n. 1 (1194), p. 5.
[63] *Ibid.*, p. 8.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

The justice of Islam does not admit the logic that the command of God is executed on the thief as punishment for what he or she might have stolen and yet we neglect the command of God on the payment of *zakah* (legal alms) and the social support system (*al-takaful al-ijtima'i*) of Islam. There is only one verse in the Qur'an on the *hadd* of theft but literally dozens of *ayat* (verses) on *zakah* and helping the poor.[64]

Muhammad al-Ghazali has advanced a similar argument and finds certain aspects of the debate on the enforcement of *hudud* to be less than acceptable and convicing. "We do not dispute", wrote al-Ghazali, "that the *hudud* are a part of Islam, but we find it strange that they are considered to be the whole of it".[65] To enforce the *hudud*, we need to establish an Islamic political order first. Ghazali went on to comment, "we wish to see these punishments enforced ... but not so that the hand of a petty thief be cut while those punishments are waived in cases of embezzlement of fantastic funds from public treasury".[66]

These and similar considerations have led Mustafa al-Zarqa to the conclusion that the prevailing environment is unsuitable for the enforcement of *hudud*. He then invokes the legal maxim of *Shari'a* that, "necessity makes the unlawful permissible – *al-darurat tabih al-mahzurat*", (the origin of this legal maxim is Qur'anic (al-Baqarah, 2:173). Al-Zarqa further adds, when emergency or unavoidable situations hinder an obligation (*wajib*) then the latter may be temporarily postponed. Based on this argument al-Zarqa concluded that the *hudud* may be substituted with temporary measures and alternative punishments until such a time when conditions are right for their proper enforcement.[67]

And finally, I propose to invoke the ruling of the Hadith, discussed above, on the suspension of *hudud* in doubtful situations, to the prevailing conditions of modern society. The wording of the Hadith, where it reads, "drop the *hudud* in all cases of doubt", is such that it can be invoked to situations outside the courtroom environment. Although the Hadith is primarily concerned with the evidential process, court proceedings and proof, it is nevertheless not exclusively related nor confined to that context.

According to another report, three prominent Companions, Abd Allah b. Mas'ud, Mu'adh b. Jabal and 'Uqbah b. 'Amir, have said: "When doubt befalls you concerning a *hadd*, suspend it".

Al-Zuhri's investigation has also led him to state in principle that "*hudud* should be suspended in all cases of doubt".[68]

Typical examples of *al-shubhat* that are given in the works of *fiqh* include, in relationship to *shurb*, for example, such cases where liquor is drunk mistakenly for vinegar or medicine, or when *zina* is committed with a woman who is mistaken for

[64] Al-Qaradawi, n. 61, *supra*, at 162.
[65] Muhammad al-Ghazali, *Min Huna Na'lam*, Cairo, 1948, p. 5. Also discussed by Hamid Enayat, *Modern Islamic Political Thought*, London: The Macmillan Press, 1989, p. 90.
[66] *Ibid.*, pp. 30–31; Enayat, n. 65, *supra*, p. 90.
[67] Mustafa Ahmad al-Zarqa, *Al-Madkhal al-Fiqhi al-'Am*, Damascus: Dar al-Fikr, 1387/1968, I, 51.
[68] Jamal al-Din al-Zayla'i, *Nasb al-Rayah li-Ahadith al-Hidayah*, 2nd edn, Beirut: Al-Maktab al-Islami, 1393 H, II, 333.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

one's wife, or when *zina* occurs between a finally divorced couple who might have thought that they were still in a lawful marriage.[69] Similarly, theft from the public treasury (Bayt al-Mal) does not invoke the prescribed *hadd* punishment because the thief is deemed to have a share, however slight, in the assets of Bayt al-Mal. In a similar vein, the ruling of *fiqh*, founded in the authority of Hadith, which validates suspension of the *hadd* punishment in the event where the defendant retracts his confession is yet another manifestation of *shubha* in the implementation of *hudud*. When the person retracts his or her confession it casts doubt on the veracity of that confession, which is enough to suspend the punishment in question.[70]

The majority of jurists (*jumhur*) have adopted the substance of the Hadith under discussion and ruled that doubt invalidates the *hudud*. Only the Zahiris have held otherwise on the analysis that this would interfere with the implementation of the clear injunctions of *Shari'a*; they have also questioned the authenticity of this Hadith. Without entering into detail, suffice it to note here that the majority have differed between themselves as to what exactly amounts to doubt (*shubha*) and what does not.

The consequences of applying the principle that doubt invalidates the *hudud* tend to vary in the sense that it may either completely absolve the accused of all charges or may exempt him from the prescribed punishment and leave open the possibility of applying a lesser punishment under *ta'zir*.

In certain other circumstances, *shubha* may suspend the principal punishment of *hadd* but a lesser punishment may still be imposed. Thus, when a person steals from the public treasury, or when the father steals from his son, the *hadd* of theft is suspended but the judge may consider imposing a lesser punishment of *ta'zir*. Similarly, a person who retracts his or her confession is acquitted of *hadd* but may still be punished under *ta'zir*.[71]

It thus appears that the *fiqhi* interpretations of *shubha* in the Hadith under discussion have included a wide range of circumstances which the ulema perceived as "doubt" in light of the prevailing conditions of their time. It is perhaps a mere extension of the same logic for us to extend the application of the Hadith-cum-legal maxim to our contemporary conditions. Bearing in mind the general language of the Hadith which is not specific to the evidential process alone, it is perhaps doubt of any kind, within or outside the judicial process, that would fall within the purpose and cautionary advice of this Hadith. The circumstances of modern society, as I discussed above, the ubiquitous temptation to sin on the one hand, rampant secularity and a total absence of the necessary context and conditions for the enforcement of *hudud*, on the other, do, I believe, present us with a doubtful

[69] *Cf.*, Al-Majlis al-A'la lil-Shu'un al-Islamiyyah, "al-Ishtubah fil-Hudud", in *Mawsu'ah Jamal 'Abd an-Nassir*, Cairo: Matabi al-Ihram al-Tijariyyah, 1393/1973, X, 74.

[70] *Cf.*, al-Kasani, n. 33, *supra*, at VII, 42; *Mawsu'ah*, n. 69, *supra*, at X, 382 ff., 'Awdah, n. 18, *supra*, at II, 209.

[71] Abu Zahrah, n. 29, *supra*, pp. 219, 228; 'Awdah, n. 18, *supra*, at II, 214.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

situation that would fall within the broad meaning and purpose of the Hadith. When we apply the ruling of that Hadith in a total sense then the *hudud* would automatically be reduced to *ta'zir* which can include a variety of punishments that the legislature and court might consider most suitable for purposes of reformation and deterrence.

CONCLUSION

The Hudud Bill is a product of undiluted imitation (*taqlid*) failing to acknowledge the contemporary realities of Malaysian society, and make necessary adjustments to some of the *fiqhi* formulations of pre-modern times. In discussing the provisions of this Bill I have specified where and how an *ijtihadi* approach to legal adjustment and reform could beneficially be taken. But specific measures in *ijtihad* should always be guided by the broader vision and objectives of *Shari'a*. With this purpose in mind, I have advanced a certain perspective over the understanding of *hudud* in the Qur'an and Sunnah, where I highlighted some of the most neglected and yet vitally important aspects of the Qur'an that merit our attention in the formulation of a comprehensive Islamic philosophy of punishment. The gap between the ideal and reality and between the theory and practice of *Shari'a* has grown so wide as to make attention to particularities of legal practice relatively insignificant at a time when the *Shari'a* as a whole is being challenged as being irrelevant to the concerns of modern society. The question naturally arises whether the attempt on the part of the State Government of Kelantan, even if it succeeds, is not likely to make the *Shari'a* an object of fear at a time when our efforts should be in the direction of emphasising the more compassionate and humanitarian teachings of Islam that are universally appealing.

At its present time in history and in face of the crisis that has afflicted the liberality and calibre of Islamic thought, the *ummah* is faced with difficult choices. We either choose to retain the eternal message of Islam, to uphold its civilisational ideals, and invest our energy in the task of reconstructing a society in that image, or lower our sights to see only the concrete rules and specific details. This latter alternative is not only unwise but also methodologically unsound as it attaches higher priority to details and makes them the focus of attention at the expense of the broader and more important objectives of Islam. Islam's commitment to moral virtue, to justice, to equality and freedom, to the realisation of benefit, and to the promotion of humanitarian and compassionate values, are of universal and perpetual significance. Failing to understand these will inevitably lead to the misapprehension and misinterpretation of Islam and its criminal justice. To believe that Islam is static is to deny it universality and transcendence. By the same token, to believe that true Islam is only how it was applied in medieval times is as erroneous as the secularist assertion that it is no longer relevant to modern society. To fall into the trap of literalism such that would blur our vision of the ideals and objectives of *Shari'a* (*maqasid al-shari'ah*) in total dedication to specific details

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions

violates the wisdom and *hikhmah* of Islam which takes such a high profile in the Qur'an and the exemplary Sunnah of the Prophet.

To devise effective deterrents against criminality and aggression must be the overriding objective of an Islamic penal policy, just as they are of the *hudud* penalties. The deterrent and punitive efforts need also to be moderated with considerations of care and compassion, such that would nurture the prospects of reformation and return, whenever possible, to normal life in society. If this is undertaken with diligence, then I believe that the Muslim community would have observed the basic purpose and meaning of *hudud* Allah. If the specific punishments are temporarily suspended for fear of indulgence in uncertainty and doubt, while in the meantime efforts are made which would pave the way for a more comprehensive understanding and implementation of *Shari'a*, this would be a worthwhile endeavour and, I believe, ultimately more meaningful.

And finally, the analysis that I have presented in this enquiry does not affect the existing structure of punishments for offences that fall under the category of *ta'zir*. The very philosophy of *ta'zir* accommodates the combination of deterrent and reformative objectives that the Qur'an has advocated for combating crime. The only proviso to note here is that my use of the terms *hadd* and *ta'zir* is only meant to refer to the former as a fixed, and the latter as a variable, punishment – and not necessarily to invoke the conventional juristic details that are attached to these terms. The government and the *ulu al-amr* are within their rights to introduce legislation that might seek to regulate the proper application of *ta'zir* both as a concept and a methodology of punishment. Muslim jurists have not emphasised custodial sentences to the same extent as they have been emphasised in Western jurisprudence, and I believe that this should remain a guideline for sentencing in *ta'zir* offences. Prison sentences should be available, of course, but should not be relied upon as a *principal* instrument of Islamic penal policy. The government policy in administering *ta'zir* should be formulated in the true spirit of a *Shari'a*-oriented policy or *siyasah shar'iyyah*, that seeks to administer justice, establish good government, and fight criminality and corruption by all means at its disposal and in all reasonable ways that are deemed to realise the best interest (*maslahah*) of the community. As a principle of public policy, the hallmark of *siyasah shar'iyyah* must always be its pursuit and realisation of the overriding values and objectives (*al-maqasid*) of the *Shari'a*.[72] It should be the manifest purpose of such a policy, in the area particularly of criminal law including the *hudud*, to facilitate necessary adjustment in the law so as to bring the conventional formulations of penal law in line with the Qur'anic vision of the basic objectives and philosophy of punishment.

[72] For further detail on *siyasah shar'iyyah* see M.H. Kamali, "Siyasah Shar'iyyah of the Policies of Islamic Government", *The American Journal of Islamic Social Sciences*, Vol. 6 (1989), 59–81.

This content downloaded from 128.111.121.42 on Thu, 02 Jul 2015 19:47:02 UTC
All use subject to JSTOR Terms and Conditions